

7/25/86

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY JUL 26 1986
BEFORE THE ADMINISTRATOR

In the Matter of)
Electronics For Industry, Inc.,) Docket No. IF&R-04-8506-C
Respondent)

Federal Insecticide, Fungicide and Rodenticide Act. A device known as "RAT-I-CATOR" for which claims are made that rodent infestation will be eliminated by use of high frequency sound is a pesticidal device within the meaning of Section 2(h) of FIFRA (7 U.S.C. §136(h)), and also within the meaning of the publication "Pest Control Devices and Device Producers - Consolidation and Clarification of Requirements," 41 Fed. Reg. 51065, Nov. 19, 1976.

Appearances:

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Counsel for Respondent

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Counsel for Complainant

INITIAL DECISION
of
Honorable Edward B. Finch
Chief Administrative Law Judge

This is an administrative action for the assessment of civil penalties instituted pursuant to Section 14 of the Federal Insecticide, Fungicide and Rodenticide Act, as amended, 7 U.S.C. §136, hereinafter FIFRA. This Complaint served as notice that the U. S. Environmental Protection Agency, hereinafter EPA, had reason to believe that Electronics For Industry, Inc., Miami, Florida, has violated §12 of FIFRA, 7 U.S.C. §136(j). The Complainant, by delegation from the Administrator of the U. S. EPA, is the Regional Administrator; EPA; Region IV. The Respondent is Electronics For Industry, Inc.; 14380 Southwest 139th Court; Miami, Florida 33186.

The Complaint alleges that Respondent has violated FIFRA and the regulations promulgated thereunder in the following respects:

On or about July 1, 1980, the Respondent offered for sale or distribution the ultrasonic pest control product "RAT-I-CATOR," Model EI-700, with transformers to Ultrasonics of Florida; 31 Scott Drive; Marietta, Georgia 30067 (sample number 127082).

Said product "RAT-I-CATOR" is a pesticidal "device" within the meaning of Section 2(h) of FIFRA, 7 U.S.C. §136(h), and within the meaning of the publication entitled "Pest Control Devices and Device Producers - Consolidation and Clarification of Requirements" which appeared in the November 19, 1976 Federal Register at 41 Fed. Reg. 51065, et seq.

Said pesticidal device is misbranded per Section 2(q)(1)(A) of FIFRA, 7 U.S.C. §136(q)(1)(A) in that its labeling bears a statement which is false

or misleading. Said misbranding is unlawful under Section 12(a)(1)(F) of FIFRA, 7 U.S.C. §136j(a)(1)(F).

The associated labeling for the device at the point of sale is false and misleading in that the labeling makes claims about the electronic device's effectiveness against rodents that were not supported in tests on the device conducted by the U. S. Department of Interior; Fish and Wildlife Service; Denver, Colorado, for EPA using Norway rats, deer mice and house mice.

The Complaint sets for three counts, Count I being the foregoing and Counts II and III are the same except for the dates the product was held for sale and distribution.

Complainant proposed a civil penalty of \$1,540.00 for each count or a total of \$4,620.00.

Respondent filed an Answer in which it basically asserts that the product herein is not a pesticidal device citing the law on the subject. Complainant raised these same defenses in a previous matter involving the registration of this identical product. (Docket No. IF&R-IV-577C) The Court rejected these arguments then and has rejected them in this proceeding holding the product is a pesticidal device subject to FIFRA.

An adjudicatory hearing was scheduled and all parties appeared at 9:30 AM, May 21, 1986 in the U. S. Courthouse; Ft. Lauderdale, Florida.

Prior to the commencement of the hearing, the parties informed the Court that there was still a possibility for settlement of the matter. The Court, always encouraging settlement, adjourned the hearing until 2:00 PM.

At that time the parties stated for the record that a settlement had been reached and then orally entered the basic terms in the record. Tr., p 3-12. A written Motion For Decision On The Pleading And Stipulations, signed by both parties was executed May 22, 1986. The parties had filed their prehearing exchange of documents and disclosure of witnesses which together shall be included as pleadings for the purposes of the above Motion. Motion attached.

Said Motion, in addition to the Stipulation, contains Findings Of Fact which are adopted as the Findings of Fact of this Decision. Since the stipulation sets forth an agreed amount of the civil penalty (\$924.00) said amount will be accepted by the Court.

FINAL ORDER^{*/}

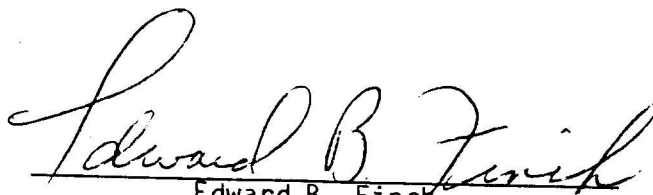
1. Pursuant to Section 14(a)(1) of the Federal Insecticide, Fungicide and Rodenticide Act, as amended, a civil penalty of \$924.00 is assessed against Respondent, Electronics For Industry, Inc., for the violations which have been established on the basis of the Complaint and Stipulations herein.

^{*/} 40 CFR 22.27(c) provides that this Initial Decision shall become the Final Order of the Administrator within 45 days after its Service upon the parties unless an appeal is taken by one of the parties or the Administrator elects to review the Initial Decision. Section 22.30(a) provides for appeal herefrom within 20 days.

2. Payment of \$924.00, the civil penalty assessed, shall be made within sixty (60) days after receipt of the Final Order by forwarding a Cashier's Check or Certified Check made payable to the Treasurer, United States of America to:

Regional Hearing Clerk
U. S. EPA, Region IV
P. O. Box 100142
Atlanta, GA 30384

It is so ordered.


Edward B. Finch
Chief Administrative Law Judge

Dated: July 25, 1986
Washington, D. C.

BEFORE THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

FILE: 24

IN RE: : I.F.&R. No. 04-8506-C
Electronics for Industry, Inc., : MOTION FOR DECISION ON THE
Respondent. : PLEADINGS AND STIPULATIONS
: :
: :
: :

NOW COME the Parties to the above-captioned matter and show unto the Court the following:

WHEREAS, the Complainant, the United States Environmental Protection Agency, filed a Complaint alleging misbranding of Respondent's pesticidal device, the "RAT-I-CATOR"; and

WHEREAS, the Respondent filed an Answer denying the allegations of the Complaint; and

WHEREAS, the Parties filed their prehearing exchange of documents and disclosure of witnesses and Amendments thereto which together shall be deemed pleadings for the purposes of this Motion.

NOW THEREFORE, in order to avoid further litigation, the Parties jointly move for a decision by the Court based on the pleadings filed in this matter.

S T I P U L A T I O N S

The Parties join together and stipulate the following:

- A. The Respondent will stop all domestic sales and promotions of the "RAT-I-CATOR" and will not sell, promote, produce or develop for the domestic United States market any type of ultrasonic pest control device. Further, the Respondent agrees to cease all foreign sales, production and promotions of the "RAT-I-CATOR" as well as other ultrasonic pest control devices to the extent FIFRA governs the branding and labelling claims of exported pest control devices.
- B. An appropriate civil penalty in this matter is \$924.00.
- C. The Complainant, United States Environmental Protection Agency, will not take any action against the Respondent for any units that the Respondent sold prior to May 21, 1986.

FINDINGS OF FACT

In order to resolve this matter, the Respondent does not object to the following Findings of Fact, but maintains its denial of the allegations in the Complaint and the following Paragraphs 4, 5, 6 and 10.

1. Electronics for Industry, Inc., hereinafter referred to as the Respondent, is located in Miami, Florida.
2. The Respondent is a "person" as defined by Section 2 (s) of FIFRA [7 U.S.C. §136 (s)] and as such is subject to FIFRA and the regulations promulgated thereunder.
3. On or about July 1, 1980; September 17, 1982; and April 9, 1985; the Respondent offered for sale or distribution the ultrasonic pest control product "RAT-I-CATOR" (Sample numbers

127082, 276995, 276996).

4. Said product "RAT-I-CATOR" is a pesticidal "device" within the meaning of Section 2(h) of FIFRA [7 U.S.C. §136(h)], and within the meaning of the publication entitled "PEST CONTROL DEVICES AND DEVICE PRODUCERS Consolidation and Clarification of Requirements" which appeared in the November 19, 1976 Federal Register at 41 Fed. Reg. 51065 et seq.

5. Said pesticidal device is misbranded per Section 2(q)(1)(A) and 2(q)(1)(G) of FIFRA [7 U.S.C. §§136 (q)(1)(A) and 136 (q)(1)(G)] in that its labeling bears a statement which is false or misleading and lacks adequate warning or caution statements. Said misbranding is unlawful under Section 12(a)(1)(F) of FIFRA [7 U.S.C. §136j(a)(1)(F)].

6. The associated labeling for the device is false and misleading in that the labeling makes claims about the electronic device's effectiveness against rodents that were not supported by test results.

7. "Report of Efficacy Studies of the RAT-I-CATOR Rodent Control Device" by Stephen A. Shumake et al., is based upon proper testing methodology and was validated by a peer review.

8. Many other studies of ultrasonic devices by the scientific community have failed to demonstrate the usefulness of ultrasonic devices in rodent control programs.

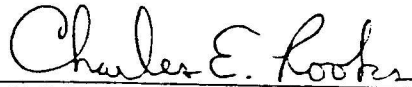
9. No studies on ultrasonic devices generally or the RAT-I-CATOR specifically are included in the pleadings which contradict the statements made in the articles referred to in

Paragraphs seven and eight above.


10. Ultrasonic devices are ineffective in rodent control.

Respectfully submitted,

FOR COMPLAINANT

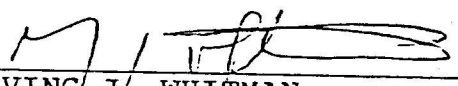


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FOR RESPONDENT

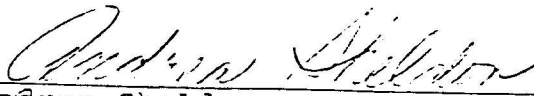


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DATED this 22nd day of May, 1986.

C E R T I F I C A T I O N

THIS IS TO CERTIFY that the original of this MOTION FOR DECISION ON THE PLEADINGS AND STIPULATIONS was sent certified mail to SANDY BECK, Regional Hearing Clerk, Region IV, 345 Courtland Street, Northeast, Atlanta, Georgia, 30365; and a true and correct copy was sent certified mail to THE HONORABLE EDWARD FINCH, Chief Administrative Law Judge, U. S. Environmental Protection Agency, Washington, D. C. 20460, this 22nd day of May, 1986.



Andrea Sheldon
Secretary

I hereby certify that the original of this Initial Decision was hand-delivered to the Hearing Clerk, U. S. EPA, Headquarters, and that three copies were sent by certified mail, return receipt requested, to the Regional Hearing Clerk, U. S. EPA, Region IV, for distribution in accordance with 40 CFR 22.27(a).


Leanne B. Boisvert
Legal Staff Assistant

Dated: July 25, 1986